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6 **Attorney for Plaintiff**  
KAOH SUISAN CO., LTD.

FILED  
DISTRICT COURT OF GUAM  
OCT 21 2003  
MARY L. M. MORAN  
CLERK OF COURT

10  
11 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF GUAM**

13 KAIOH SUISAN CO., LTD. ) CIVIL CASE NO. 02-00021  
14 Plaintiff, )  
15 vs. )  
16 GUAM YTK CORP., ) PLAINTIFF KAIOH SUISAN CO., LTD.'S  
17 Defendant. ) RENEWED MOTION FOR SUMMARY  
 ) JUDGMENT; MEMORANDUM;  
 ) CERTIFICATE OF SERVICE  
18 )  
 )

Plaintiff KAOH SUISAN CO., LTD. through counsel, **VERNIER & MAHER, LLP**, by Terence E. Timblin, Esq., hereby renews its motion for summary judgment against Defendant on the grounds that Defendant has failed to obey this Court's Order to file its Trial Brief and has otherwise failed to create a material issue of fact.

ORIGINAL

1 that would require a trial to resolve.

2 Dated this 21<sup>st</sup> day of October, 2003.

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VERNIER & MAHER, LLP  
Attorneys for Plaintiff  
KAI OH SUISAN CO., LTD

BY: 

TERENCE E. TIMBLIN, ESQ.

## MEMORANDUM OF POINTS AND AUTHORITIES

### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a Motion for Summary Judgment on February 6, 2003 arguing that it was entitled to judgment as Defendant has admitted the existence of the written Agreement and that it received and accepted 100,000,000 yen pursuant to the Agreement, and is therefore barred by the parole evidence rule from altering, amending or contradicting its terms. At the hearing on the Motion on March 28, 2003, and in a subsequent written Order, the Court denied it on the basis that Defendant had raised material issues of fact. Plaintiff filed a Trial Brief, as required by LR 16.7(b), and a Witness List, as required by LR 16.7(d)(1), on July 29, 2003. The Trial Brief addressed the factual issues that the Court regarded as material. The Preliminary Pretrial Conference was held on October 9, 2003 at which time the Court ordered Defendant to file its Trial Brief and Witness List by October 14, 2003. As of this writing, Defendant has failed to file either a Trial Brief or a Witness List.

As required by LR 16.7(e), counsel for Plaintiff prepared a proposed Pretrial Order and served it on Defendant on June 4, 2003. See, Exhibit "A". Counsel for

1 Defendant was requested to fill in the portion of the Order reserved for Defendant's  
2 factual contentions and set forth any proposed changes. Despite several promises to  
3 do so, counsel for Defendant was failed to take any action with respect to the  
4 proposed Order. See, Exhibit "B".

5

6 **ARGUMENT**

7

8 Based on the admissions by Defendant in the pleadings and the memoranda  
9 and exhibits set forth in the initial Motion for Summary Judgment and Plaintiff's Trial  
10 Brief, the following facts are beyond any rational dispute:

11 That Defendant made a written request to Plaintiff to borrow 100,000,000  
12 Japanese yen in two installments of 50,000,000 yen each.

13 That the parties signed a written agreement by which Defendant borrowed  
14 one hundred million Japanese yen from Plaintiff in two installments of 50,000,000  
15 yen each.

16 That Plaintiff transferred one hundred million Japanese yen to Defendant and  
17 that Defendant has failed to repay any of this amount according to the schedule set  
18 forth in the written agreement.

19 These facts are utterly consistent with a loan transaction and utterly  
20 inconsistent with anything else. The most that Defendant has managed to offer thus  
21 far is a denial that the transaction was a loan. What is completely absent are factual  
22 allegations of what the transaction otherwise was. Defendant has been offered the  
23 opportunity to make these allegations as part of the proposed Pretrial Order and has  
24 failed to do so. Defendant has been ordered by the Court to file a Trial Brief setting  
25

1 forth its contentions and has again failed to do so. The obvious reason for this failure  
2 is that Defendant has no plausible alternative explanation to the written documentation  
3 of the transaction.

4 Since Defendant cannot even articulate, let alone prove, what the transaction  
5 was if it was not a loan, a trial would be a waste of the resources of both the parties  
6 and the Court. Summary judgment should, therefore, be entered.  
7

8 Judgment should be granted for the further reason that the failure of  
9 Defendant to disclose its version of events places Plaintiff at an unfair disadvantage  
10 in preparing for trial.

11 Respectfully submitted this 21<sup>st</sup> day of October, 2003.

12 **VERNIER & MAHER, LLP**  
13 Attorney for Plaintiff  
14 **KAIOH SUISAN CO., LTD.**

15 BY:   
16 **TERENCE E. TIMBLIN, ESQ.**

## **CERTIFICATE OF SERVICE**

I, **TERENCE E. TIMBLIN**, hereby certify that on the 21<sup>st</sup> day of October, 2003,  
I caused a copy of the annexed **PLAINTIFF KAOH SUISAN CO., LTD.'S  
RENEWED MOTION FOR SUMMARY JUDGMENT** to be served upon Defendant,  
by delivering and leaving a copy of same to its attorney of record, as follows:

**Phillip Torres  
TEKER CIVILLE TORRES & TANG, PLLC  
Suite 200, 330 Hernan Cortez Avenue  
Hagåtña, Guam 96910**

Dated this 21<sup>st</sup> day of October, 2003.

**VERNIER & MAHER, LLP**  
Attorneys for Plaintiff  
**KAIOH SUISAN CO., LTD.**

BY:

~~TERENCE E. TIMBLIN~~

FRANCIS M. McKEOWN  
D. PAUL VERNIER, JR.\*\*  
JOHN G. PRICE\*  
JOHN B. MAHER\*\*  
COLIN C. MUNRO\*  
LOUIE J. YANZA\*\*  
MICHAEL D. FLYNN, JR.  
THOMAS S. CLIFTON\*  
TERENCE E. TIMBLIN\*\*  
JEANINE M. LARREA\*



McKEOWN • VERNIER • PRICE • MAHER  
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\*ADMITTED IN CA  
\*\*ADMITTED IN GUAM

June 3, 2003

VIA FACSIMILE - 472-2601

Mr. Phillip Torres  
**TEKER CIVILLE TORRES & TANG, PLLC**  
Suite 200, 330 Hernan Cortez Avenue  
Hagatna, Guam 96910

**RECEIVED**

2:15 p.m.  
JUN 04 2003

**TEKER CIVILLE  
TORRES & TANG**

RE: **KAIOH SUISAN CO., LTD. v. GUAM YTK CORP.**  
**UNITED STATES DISTRICT COURT CIVIL CASE NO. CV02-00021**  
**MVPM File No.: K-0010.4**

Dear Phil:

Enclosed is a draft of a proposed Pretrial Order in the above matter. Please fill in your contentions in Paragraph 6 and make any other proposed changes.

I have included among the proposed admissions that Mr. Kamiyama signed the letter requesting the loan, as I do not think that he could deny that in good faith after his evasions at his deposition. Obviously, he is still free to offer whatever explanation he sees fit.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

**McKEOWN • VERNIER • PRICE • MAHER**

Terence E. Timblin

Enclosure

cc: Mr. Shunsaku Yuasa  
Allen D. Clark, Esq.

\\Valerie\\c\\MarieBackup\\My Documents\\CLIENTS (NON-GA)\\00021\\Correspondence\\Torres 060303.doc

Exhibit

kaioh v Guam YTK - USDC CVA02-

A

BERKELEY OFFICE: 2030 ADDISON STREET, SUITE 300 • BERKELEY, CA 94704  
TELEPHONE 510-549-8787 • FACSIMILE 510-549-8788

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2 McKEOWN • VERNIER • PRICE • MAHER  
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7 Attorneys for Plaintiff  
KAIOH SUISAN CO., LTD.

8  
9 UNITED STATES DISTRICT COURT  
10 DISTRICT OF GUAM  
11 KAIOH SUISAN CO., LTD. ) CIVIL CASE NO. 02-00021  
12 Plaintiff,  
13 vs.  
14 GUAM YTK CORP., )  
15 Defendant. )  
16  
17 Following Pretrial proceedings, pursuant to Rule 16, Federal Rules of Civil  
18 Procedure, and Local Rule 16.7,  
19  
20 IT IS ORDERED:  
21  
22 1. (a) This is an action to recover One Hundred Million Japanese Yen  
23 (¥100,000,000) paid by Plaintiff KAIOH SUISAN CO., LTD. ("KAIOH") to Defendant  
24 GUAM YTK CORP. ("GUAM YTK"). Plaintiff KAIOH alleges that that this amount was  
25 a loan to Defendant GUAM YTK, as evidenced by the Agreement attached to the

1 Complaint as **Exhibit A**, and seeks damages for failure to repay the loan pursuant to  
2 the terms of the Agreement. Defendant GUAM YTK has denied that the transaction  
3 was a loan and affirmatively pled that it was another form of investment and that  
4 nothing is owed to Plaintiff KAI OH.

5 (b) The parties are: KAI OH SUISAN CORP., a foreign corporation  
6 organized and existing under the laws of Japan, Plaintiff GUAM YTK CORP., a  
7 corporation organized, existing and doing business under the laws of Guam,  
8 Defendant.

9  
10 Each of these parties has been served and has appeared. All other parties  
11 named in the pleadings and not identified in the preceding paragraphs are now  
12 dismissed.

13  
14 (c) The pleadings which raise the issues are:

15 Complaint, filed August 1, 2002

16 Answer to Complaint, filed August 16, 2002

17  
18 2. **Jurisdiction and venue are invoked upon the grounds:**

19  
20 Diversity of citizenship of the parties, pursuant to 28 USC §1332. The amount  
21 due and payable, pursuant to the terms of the Agreement as of June 1, 2003, is  
22 Eighty-Five Million Japanese Yen (¥85,000,000) with a dollar equivalent of  
23 approximately Six Hundred Ninety Thousand Dollars (\$690,000.00), which exceeds  
24

1 the jurisdictional amount of Seventy-Five Thousand Dollars (\$75,000.00). The facts  
2 requisite to federal jurisdiction are admitted.

3           **3. The following facts are admitted and require no proof:**

4           The Court has jurisdiction over this matter and the amount in controversy  
5 exceeds \$75,000.00.

6           Plaintiff KAIOH at all times relevant herein is a foreign corporation organized  
7 and existing under the laws of Japan.

8           Defendant GUAM YTK is a corporation organized, existing and doing business  
9 under the laws of Guam.

10           On or about March 10, 2001 Plaintiff KAIOH and Defendant GUAM YTK  
11 entered into an Agreement by which Defendant GUAM YTK borrowed ¥100,000,000  
12 from Plaintiff KAIOH; and that the actual transfer of the funds to Defendant GUAM  
13 YTK was accomplished by way of two (2) wire transfers of Fifty Million Japanese Yen  
14 (¥50,000,000) through a corporate subsidiary of Plaintiff KAIOH.

15           Pursuant to the terms of the Agreement, Defendant GUAM YTK is required to  
16 repay the loan in installments of Five Million Japanese Yen (¥5,000,000) at the end of  
17 each month beginning with January of 2002; Defendant GUAM YTK is required to pay  
18 interest of two percent (2%) per annum from the date of the transfer of the funds, to be  
19 calculated and paid after the final payment of principal is due; as of the end of May of  
20 2003, ¥85,000,000 is due and payable, Defendant GUAM YTK has not paid any of this  
21 amount; and that additional installments will become due and payable through August,  
22 2003.

1 During the course of negotiating the Agreement, Tom Kamiyama, the President  
2 of Defendant GUAM YTK, signed a letter that is addressed to the Chairman of the  
3 Board of Plaintiff KAIOH requesting a loan of ¥100,000,000 on terms similar to those  
4 set forth in the Agreement. The letter is Plaintiff KAIOH's Exhibit \_\_\_\_.

5  
6 4. The reservations as to the facts recited in paragraph 3, above, are  
7 as follows: None.  
8  
9

10 5. The following facts, though not admitted, are not to be contested at  
11 the trial by evidence to the contrary: None.  
12  
13

14 6. The following issues of facts, and no others, remain to be litigated  
15 at the trial:  
16  
17

18 Defendant GUAM YTK asserts that, notwithstanding the written Agreement and  
19 other documentation presented by Plaintiff KAIOH, that the transaction in question was  
20 not a loan but a \_\_\_\_\_. Defendant GUAM YTK will offer  
21 evidence to prove (to be completed by Defendant GUAM YTK)  
22  
23  
24  
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1       7. The following issues of law, and no others, remain to be litigated at  
2 the trial:

3       Whether Defendant GUAM YTK is precluded by 6 GCA §2511, the Guam parol  
4 evidence rule, from using extrinsic evidence to vary or contradict the terms of the  
5 Agreement.

6       Whether Defendant GUAM YTK is bound by a document voluntarily signed by  
7 its President even if he did not understand English.

8       Whether Plaintiff KAIOH was required to have a Guam business license in  
9 order to bring this action.

11      8. All discovery is complete.

13      9. The Exhibit Lists of the parties have been filed with the Court as  
14 required by Local Rule 16.7. The parties anticipate the following objections to  
15 the exhibits listed below: None

17      10. Witness lists of the parties have heretofore been filed with the Court  
18 as required in Local Rule 16.7. (Except for good cause shown, only the witnesses  
19 identified in the list will be permitted to testify other than for impeachment or rebuttal.)

1       11. Each party intending to present evidence by way of deposition  
2       testimony has marked such depositions in accordance with Local Rule 32.1. For  
3       this purpose, the following depositions shall be lodged with the clerk as  
4       required by Local Rule 32.1: None

5  
6       12. The following law and motion matters are pending or contemplated:  
7       None

8  
9       13. The trial is to be a non-jury trial. (If requested by Court) At least seven  
10     (7) days prior to the trial date each counsel shall serve on all parties and lodge with the  
11     Court proposed findings of fact and conclusions of law.

12  
13     14. The trial is estimated to take two (2) trial days.

14  
15     16. The Final Pretrial Conference shall be held on the Thursday, the 30<sup>th</sup>  
16     day of October, 2003 at 3:00 p.m.

17  
18     19. The Trial of this cause will be held on the Friday, the 13<sup>th</sup> day of  
20     December, 2003 at 9:30 a.m.

1       17. The foregoing admissions having been made by the parties, and the  
2 parties having specified the foregoing issues of fact and law remaining to be litigated,  
3 this Pretrial Conference Order shall supersede the pleadings and govern the course of  
4 the trial of this cause, unless modified to prevent manifest injustice.

5       Dated this \_\_\_\_\_ day of October, 2003.

6  
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9       HONORABLE JOHN S. UNPINGCO  
10      CHIEF JUDGE, DISTRICT COURT OF GUAM  
11  
12  
13      APPROVED AS TO FORM AND CONTENT  
14      TEKER CIVILLE TORRES & TANG, PLLC  
15      Attorneys for Defendant  
16      GUAM YTK CORP.  
17      By \_\_\_\_\_  
18      PHILLIP TORRES  
19  
20      \\Valerie\\MareBackup\\My Documents\\CLIENTS (NON-GIA)\\KAI OH SUISAN CO. LTD\\Kaioh v. Guam YTK - USDC CVA02-  
21      000021\\Pleadings\\Pretrial Order - Proposed 060203.doc  
22  
23  
24  
25

# VERNIER & MAHER, LLP

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Louie J. Yanza  
Michael D. Flynn, Jr.  
Terence E. Timblin

---

September 24, 2003

**VIA FACSIMILE – 472-2601**

Phillip Torres, Esq.  
**TEKER CIVILLE TORRES & TANG, PLLC**  
Suite 200, 330 Hernan Cortez Avenue  
Hagatna, Guam 96910

**RE: KAI OH SUISAN CO., LTD. v. GUAM YTK CORPORATION  
DISTRICT COURT OF GUAM, CIVIL CASE NO. 02-00021**

Dear Phil:

On June 4, 2003, we served a draft of a proposed Pretrial Order in the above matter on your office. We asked that you fill in your contentions in number 6 and make any other proposed changes. I spoke with you by phone on September 8, 2003, as to what your position on it was, and you indicated that you had filled in your contentions and filed it with the District Court. I requested that you serve me with a copy of the filed Order and you indicated that you would bring a copy with you to the Pretrial Conference in the Superior Court case that was scheduled for September 9, 2003. On September 9<sup>th</sup>, Sam Teker appeared at the Conference in your place. He did not have a filed copy of the Order and did not know anything about it. Sam Teker said he would talk to you about it. As of this writing, however, our office has not been served with a copy of the Order or otherwise heard from you.

This is to request that you confirm or deny that you have filed the Order and, if you have, that you serve us with a copy of it.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

**VERNIER & MAHER, LLP**



Terence E. Timblin

Exhibit

B

## Confirmation Report - Memory Send

Time : Sep-24-03 16:43  
Tel line : +6714725487  
Name : Vernier & Maher, LLP

Job number : 887  
Date : Sep-24 16:43  
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Start time : Sep-24 16:43  
End time : Sep-24 16:43  
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Louie J. Yanza  
Michael D. Flynn, Jr.  
Terence E. Timblin

### FACSIMILE TRANSMITTAL COVER SHEET

**TO:** Phillip Torres, Esq. - 472-2601

**DATE:** September 24, 2003

**FROM:** Terence E. Timblin

**RE:** Kaloh Sulsean Co., Ltd. v. Guam YTK Corporation, CV02-00021

**V&M FILE NO.:** G-0001.171      **NO. OF PAGES INCLUDING COVER SHEET:** 5

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#### DOCUMENTS:

1. Letter from Terence E. Timblin, Esq., dated September 24, 2003.

**IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL THE ABOVE LISTED NUMBER  
AND ASK FOR Marie.**